IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-850

BLACK MUSICIANS OF PITTSBURGH, et al., individually and on behalf of all other persons similarly situated,

*Petitioners,*

—v.—

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WILLIAM B. GOULD
Stanford Law School
Stanford, CA 94305
(415) 497-2979

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, PA 15219
(412) 355-0650

MELVIN L. WULF
American Civil Liberties Union Foundation
22 East 40th Street
New York, NY 10016
(212) 725-1222

ATTORNEYS FOR PETITIONERS

INDEX



TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

---

BLACK MUSICIANS OF PITTSBURGH and GEORGE CHILDRESS, RUBYE YOUNG, DeRUYTER KEMP, THOMAS MILLER, CHARLES AUSTIN and GEORGE SPAULDING, individually and on behalf of all other persons similarly situated,

Petitioners,

--v.--

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

---

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on September 24, 1976, the Petition for Rehearing En Banc having been denied on October 28, 1976.

## OPINIONS BELOW

No opinion was provided by the Court of Appeals for the Third Circuit, but the orders denying the appeals are set out in the Appendix, infra, pp. 13a-16a. The opinion of the District Court for the Western District of Pennsylvania is set out in the Appendix, infra, pp. 1a-12a.

## JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on September 24, 1976, and the Petition for Rehearing of the order was denied on October 28, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the District Court's refusal to consider the effects of past and pre-Title VII membership and employment discrimination upon the present membership practices of Defendants?

2. Did the Court of Appeals err in affirming the District Court's dismissal of Petitioners' prayer for relief where the District Court's judgment was based solely on an erroneous view of the law



and the Court of Appeals neither provided any kind of opinion, nor guidance to the District Court of a proper exercise of its discretion, nor any carefully articulated view of why relief should not be granted?

## STATUTORY PROVISIONS INVOLVED

The right to contract, and the remedy, provisions of Sections 1 and 3 of the Civil Rights Act of 1866, which provisions are codified as 42 U.S.C. §§ 1981 and 1988 (1970).

The prohibition of discrimination by unions (in Section 703(c)), and the remedy provision (in Section 706(g)), of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(c) and 2000e-5(g) (1972 Supp.).

These provisions are set out in the Appendix, infra, pp. 17a et seq.

## STATEMENT OF THE FACTS

Petitioners brought this class action in October, 1971, seeking relief from racial membership[1/] discrimination for the victims of such practices which were engaged in by Defendants. Petitioners' claims are based upon (1) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e --2000e-17 (1970), (2) Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970), and (3) Sections 1 and 301 of the

---

1/ The complaint also alleged employment discrimination but this was addressed in a Consent Decree with defendant employers, entered into shortly before trial in 1975.

National Labor Relations Act, as amended, 29 U.S.C. §§ 151 and 185 (1970).[2/] The District Court's jurisdiction rested upon 28 U.S.C. §§ 1331, 1343, and 2201, and 42 U.S.C. § 2000e-5. Subsequent to the filing of the action the Equal Employment Opportunity Commission, with whom administrative complaints had been filed, found reasonable cause to believe that Defendants were engaged in racially discriminatory practices violative of Title VII of the Civil Rights Act of 1964. Specifically, the Commission found that Defendants had a long history of segregated unions and discriminatory employment practices, "the past and present discriminatory practices of the Local have had a 'chilling effect' on the ability of the Local to establish credibility with the black musicians, with the result that many black members are refusing to pay dues or have left the union altogether, while young black musicians are deterred from joining." (App. B-6, C-23). The Commission concluded that there was reasonable cause to believe that Defendant Local had engaged in conduct violative of civil rights legislation and that Defendant Local's failure to "renew the proportionate representation guarantee of the 1965 merger agreement" (which allocated executive board positiont to black and white union members on a transitional basis until the 1970 elections) was

---

[2/] On May 8, 1974, the District Court granted a motion to dismiss relating to this portion of the complaint. While that dismissal was part of the appeal to the Court of Appeals of the Third Circuit, this Petition does not raise that issue.



similarly unlawful inasmuch as the same "necessity" for affirmative action existed in 1970--when the merged Local refused to renew the agreement--as in 1965 when the agreement was imposed. In April, 1974, the District Court issued a temporary restraining order and preliminary injunction against Defendants for instituting disciplinary procedures (under the auspices of an all white disciplinary board in which black members have no confidence [App. C-146-148]) against Plaintiffs for instituting the instant proceeding. Respondents "consented" to this injunctive relief after Petitioners were compelled to seek the protection of the District Court.

The uncontradicted evidence at the trial in February, 1975, established that (1) since 1908 there were in Pittsburgh segregated locals (white Local 60 and black Local 471) with blacks assigned to the "subsidiary" Local 471 (App. C-33) and lower-paying jobs in all black portions of Pittsburgh were reserved for the blacks (App. C-33, 38); (2) white Local 60 had ousted black union members from all white clubs (App. C-77, 83) and imposed disciplinary fines and suspensions upon blacks who dared to defy the ban (App. C-92); (3) a "white only" social club was maintained by white Local 60 which was dissolved on the eve of the effective date of Title VII rather than permit the admission of blacks on an integrated basis; (4) the very individuals responsible (e.g., App. C-38) for the above-mentioned discriminatory membership and employment practices imposed a merger agreement upon the black local subsequent to the effective date of Title VII, July 2, 1965, which agreement created defendant Local 60-471. The agreement,

The agreement, imposed over the objections of black members who feared that their minority status (2000 whites to less than 200 blacks [App. c-202]) coupled with a transitional agreement which had no specifics or timetables to end discrimination would mean the complete exclusion of blacks from leadership positions once it expired in 1970. The agreement also provided for the hiring of a black office employee as well as the election of black office holders although the key offices of President and Secretary-Treasurer were to be held by white members of Local 60 (App. C-212-214). Blacks objected to this--but to no avail.

Subsequent to the imposition of the merger agreement, the white leadership of the merged local breached it and refused to hire blacks as that agreement required (App. C-212). Moreover, as the District Court found, blacks were "frustrated" by the union political process (District Court's finding, App. G-12) both prior to, during and after the merger agreement inasmuch as during 20 years of repeated efforts to obtain reform of discriminatory membership and employment policies through meetings with and proposals to Defendants, their proposals had always been rejected (e.g., App. C-31-44, 51, 61-69, 91-100, 103-106, 143, 175, 194, 204, 212-224). In 1969, one year before the expiration of the merger agreement, Petitioners requested that it be extended inasmuch as discrimination against blacks had not ceased. But such requests were refused despite the allegation by Petitioners that all blacks would be ousted from office in an at-large election (App. C-143).

The District Court found that subsequent to the merger the social relation-



ships between the races remained the same as before the merger--although the only testimony indicated that the social relationships actually deteriorated after the merger (App. C-193, 253, 269)--a fact which Petitioners pointed out in requesting extension of the agreement. When the merger agreement expired blacks participated vigorously in the 1970 elections --as they had during the 20 year period preceding that--(App. C-143, 252, 149, 179, 175, 222, 146-148, 156)--but no white union leader provided any kind of support to any black union member in the 1970 elections (App. C-216-217, 252). All black candidates were defeated--and as a result of the above-mentioned discrimination and the failure of the white leadership to take affirmative action to undo the effects of both past and contemporary discrimination, blacks began to boycott the elections in 1972 and 1974.

The District Court opinion, which was affirmed without opinion by the Court of Appeals for the Third Circuit, did not even mention the fact that the court had found it necessary to enter a temporary restraining order and preliminary injunction in 1974 against Defendants for unlawful retaliation and harrassment of Petitioners for having instituted this action. Moreover, the District Court found that blacks could not win elections because they were inactive and had boycotted--although this boycott took place subsequent to their failure in the 1970 election in the teeth of no white support and a long history of segregation and discrimination. Finally, the District Court and the Court of Appeals for the Third Circuit concluded that the exclusion

of blacks from office was justified because blacks had undermined the efforts of the white leadership to elect, on the eve of trial, an inactive black union member who did not attend union meetings (App. C-269), who would not have been able to attend the Executive Board meetings had he been elected (App. C-284) and who viewed himself as "on the outside . . . looking into" the problems of black members (App. C-270).

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals Erred in Affirming the District Court's Refusal to Consider the Present Effects of Past Employment and Membership Discrimination Engaged in by Defendants.

The District Court and the Court of Appeals found past discrimination but refused to even consider, let alone take note of, the impact of such discrimination upon the present system. The failure of the District Court and Court of Appeals to do so places the Court of Appeals in square conflict with holdings of virtually every Circuit Court of Appeals in the United States. See, for instance, Local 189 United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970); Rodriguez v. East Texas Motor Freight, 505 F.2d 40 (5th. Cir. 1975), cert. granted, 96 S.Ct 2200 (1976); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); United States v. Sheetmetal Workers Local 36, 416 F.2d



123 (8th Cir. 1969); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970); United States v. Chesapeake & Ohio Ry., 471 F.2d 582 (4th Cir. 1972), cert. denied 411 U.S. 939 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied, 404 U.S. 984 (1971); United States v. Jacksonville Terminal Co. 451 F.2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).[3]

The obligation which applies in cases involving segregated union locals which have been merged, Long v. Georgia Kraft Co., 455 F.2d 311 (5th Cir. 1972); United States v. Jacksonville Terminal Co., supra; United States v. Chesapeake & Ohio Ry., supra, is to take steps which will insure that "everything that is possible" is done to undo the present effects of past discrimination. Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976); Rowe v. General Motors Corp. 457 F.2d 348 (5th Cir. 1972). In the segregated union cases this means steps which permit blacks to determine sufficient prestige and personal contacts to win elections on a non-racial basis. As the above stated facts note, no steps whatsoever were taken to undo the present effects of past discrimination--indeed, some of Defendants' conduct had the effect of affirmatively carrying forward discrimination into the

---

[3] In sharp contrast to the facts of the instant case where there are numerous post-Title VII violations as well as neutral practices which carry forward the consequences of the past, in Jones v. Lee Way Motor Freight, supra, United States v. Sheetmetal Workers, supra, and United States v. Chesapeake & Ohio Ry., supra, the courts found post-Title VII discriminatory conduct even though no independent violations of the statute were found to exist subsequent to its effective date.

present system. The failure to support any black candidate in the 1970 elections in light of the long history of segregation and the exclusion of blacks from Defendants' all white social club on the eve of Title VII are examples of conduct which carried forward the consequences of the past into the present system.

Finally, the unlawful retaliation and harrassment by Defendants which was enjoined by the District Court as well as the above-mentioned breach of the merger agreement were both unlawful standing alone. These practices coupled with the above-mentioned neutral practices carried forward the present effects of past membership and employment discrimination.[4/] However, instead of applying the appropriate standard of law, the District Court and the Court of Appeals relied upon Defendants' last minute support of an inactive black union member as evidence of Defendants' contemporary good faith. Such

---

4/ As we have pointed out to the District Court and the Court of Appeals, appropriate relief here should consist of either a revival of the 1965 merger agreement or an enlargement of the Executive Board with black representation. See, e.g., United States v. Montgomery County Board of Education, 395 U.S. 255 (1969); United States v. Ironworkers Local 86, supra; Long v. Georgia Kraft Co., supra. The District Court should retain jurisdiction until discrimination ceases and when new elections are conducted in 1978, determine whether Defendants should conduct elections (a) on an at-large basis as is presently done; (b) under a system of cumulative voting which would protect minorities in a color-blind fashion; or (c) on the same basis as provided for in 1976.



conduct was clearly a "resist-and-withdraw tactic . . . equivocal in purpose, motive and permanence," Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); United States v. IBEW Local 212, 472 F.2d 634 (6th Cir. 1973), and thus the position of the Third Circuit is squarely in conflict with the positions of the Fifth and Sixth Circuit Courts of Appeal.

This failure of the District Court and Court of Appeals to take into account, let alone even note, the relevance of past discrimination is not only inconsistent with decided authority in every Circuit Court of Appeals in the United States but, even more important, it is inconsistent with this Court's instructions to the judiciary that there is a duty and obligation to root out the present effects of past discrimination and "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Albemarle Paper Co. v. Moody, 442 U.S. 405, 418 (1975). Accord, Franks v. Bowman Transportation Co., ___ U.S. ___, ___, 96 S.Ct. 1251, 1267 (1976). The approach of the Court of Appeals is also inconsistent with this Court's instructions to the courts that "the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case" be part of the court's remedy. Franks v. Bowman Transportation Co., supra, at ___, 96 S.Ct. at 1267.

II. The Court of Appeals Erred in Affirming Without Opinion the District Court's Dismissal, Where the District Court's Judgment was Based Solely on an Erroneous View of the Law, and the

Court of Appeals Neither Provided an Opinion nor any Other Guidance to the District Court on the Proper Exercise of its Discretion, nor Carefully Articulated Why Relief Should not be Granted.

This Court, in Franks v. Bowman Transportation Co., ___ U.S. ___, 96 S.Ct 1251 (1976), provided that a court's discretion denying relief under Title VII may not be exercised arbitrarily, but only upon sound legal principles, and in keeping with its duty to effect the objectives of Title VII. Id. at ____, 96 S.Ct 1267. See also, Albermarle Paper Co. v. Moody, supra.

However, the District Court in this action denied Petitioners' motion for relief, not in the sound exercise of its discretion, but solely in reliance upon an erroneous view of the law. See Statement of Facts, supra.

Notwithstanding the District Court's clearly erroneous view of the law, the Court of Appeals affirmed the dismissal of the complaint without opinion and denied the Petition for Rehearing without opinion. The Court thereby breached its duty to provide firm guidance to the District Court in the exercise of its discretion so as to provide for effectuating of the objectives of Title VII as is required under Franks v. Bowman Tranportation Co. and Albermarle Paper Co. v. Moody, supra.

Nor did the Court of Appeals independently address the exhaustive evidence relating to both past membership and employment discrimination, its effect on



the present system, and independent post-Title VII violations as recent as 1974 and explain its affirmance of the District Court's judgment in the teeth of such evidence. The mere affirmance without opinion of a judgment based upon an erroneous view of law is scarcely an adequate explanation of the Court of Appeal's judgment. Where plaintiffs have suffered continuous discrimination and personal abuse for at least 40 years as the uncontradicted testimony at the trial established and, in response thereto, petition the courts for relief, this Court's holdings demand that the court which denies such relief "carefully articulate its reason for so doing" and provide careful guidance as well. Franks v. Bowman Transportation Co., supra, at 1269; Albermarle Paper Co. v. Moody, supra, at 421, n. 14. The Court of Appeals' refusal to issue an opinion, let alone provide reasons and guidance, violates the letter and spirit of this Court's judgment in Franks and Albermarle Paper and is in error.

## CONCLUSION

For the reasons stated, the Writ of Certiorari should be granted.

Respectfully submitted,

William B Gould

WILLIAM B. GOULD
Stanford Law School
Stanford, CA 94305
(415) 497-2979

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, PA 15219
(412) 355-0650

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, NY 10016
(212) 725-1222

ATTORNEYS FOR
PETITIONERS

November 23, 1976

# APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| BLACK MUSICIANS OF PITTSBURGH and GEORGE CHILDRESS, RUBYE YOUNGE, DeRUYTER KEMP, THOMAS MILLER, CHARLES AUSTIN, and GEORGE SPAULDING, individually, and on behalf of all other persons similarly situated, | : | |
| Plaintiffs | : | |
| and | : | |
| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, | : | Civil Action No. 71-1008 |
| Intervenor-Plaintiff | : | |
| vs. | : | |
| LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO, and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO | : | |
| Defendants | : | |

MEMORANDUM AND ORDER

BARRON P. McCUNE, District Judge
August 18, 1975.

The Black Musicians of Pittsburgh and the named individuals filed a



a complaint against their unions (both the Local to which they belong and the National Union) charging discrimination by the unions because of race. The American Federation of Musicians AFL-CIO is called the National Union for purposes of this memorandum.

Jurisdiction was based on 42 U.S.C. §1981, the Civil Rights Act of 1866, 42 U.S.C. §2000(e)5, the Civil Rights Act of 1964, and 29 U.S.C. §151 et seq., The National Labor Relations Act.

The Black Musicians of Pittsburgh is an unincorporated association to which all members of Local 60-471 may belong. The individual plaintiffs are all members of the union and of the association known as the Black Musicians.

Local Union 60-471 acts as exclusive agent for all musicians in Pittsburgh concerning all matters governing wages and conditions of employment and the complaint alleged that the local refers musicians to various jobs where musicians are required.

The complaint was filed as a class action on behalf of all black union members and we permitted the class to extend to all members of the union who indicated a wish to sue their union. The reasons for this approach are stated hereinafter.

The real thrust of the complaint concerned the refusal of the National Union to extend or reinstutute certain terms of a merger agreement which was made on May 17, 1976, effective January 1, 1966. Prior to January 1, 1966, there had been two local unions in Pittsburgh. Local No. 60 had been a white union. Local No. 471 had been a black union. Obviously, the National and the Locals could not countenance this situation and in 1965 at the insistence of the National, the Locals

merged into one Local known as Local No. 60-471. The existing bylaws of the unions were suspended for five years.

In the merger agreement it was provided that for a period of five years starting January 1, 1966, the Executive Board of the merged union (not counting President, Vice-President and Secretary-Treasurer) should consist of 9 members of whom 6 would be elected by Local 60 and 3 by Local 471. For the same period there were to be at least two assistants to the President of the merged union, one to be appointed from the membership of Local 471 and the other from Local 60. If a third assistant was considered necessary during the term of the agreement he was to be appointed from the membership of former Local 471.

At the end of five years, i.e., in December of 1970, the election of officers of the union (the merged union) would be an "open election", i.e., everyone would vote for the three officers and six members of the executive board. (For 5 years the executive board was increased to 9. At the end of 5 years it fell back to 6).

The complaint alleged that the merger agreement should be continued indifinitely because when the open election of December 1970 was held, the black members did not end up with the two board memberships which had been guaranteed by the agreement for the first five years. In fact, all of the officers and board members who were elected were white.

The plaintiffs alleged that following the end of the five-year period they were not properly represented and could not properly monitor the actions of the

union officers or employees who worked in the Local union office where musicians were allegedly referred to work in response to inquiries received there and that white musicians were favored in referrals so that the black musicians were not able to earn as much as the white musicians.

The plaintiffs asked that a permanent injunction issue re-instituting the terms of the merger agreement and suspending the obligation of the plaintiffs to pay dues until it was considered appropriate to reinstate the obligation and forbidding discrimination in referrals and finally, awarding "back pay" to members who had lost money because of the practices complained of.

There was a denial of all of the allegations of the complaint. After all jurisdictional and threshold questions had been cleared away it became apparent that the real issue was whether the merger agreement should be extended. The National refused on the theory that this would improperly restrict the rights of all union members to vote as they pleased.1/ The union (and the singular is used to include both the Local and the National) opposed the class action because it alleged that many members of the union were hostile to the suit and were loyal to the union and approved of the merger. There were, of course, many other reasons expressed in opposing the class action.

---

1/ The National, during pretrial, argued that the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 481 prohibited an extension of the merger agreement. The argument was not seriously pressed and we do not reach that issue.



(A consolidated action by the plaintiffs against various orchestra leaders who employed union members directly instead of through referral from the union office was amenable to settlement and that action was settled before this action went to trial).

Incidentally, we should say that prior to trial there were lengthy delays while the issues were referred to the Pennsylvania Human Relations Committee and the EEOC for conciliations which were not fruitful.

On May 8, 1974, in an opinion to which reference is made, we dismissed the count of the complaint alleging jurisdiction under the National Labor Relations Act which left standing the claims under the Civil Rights Act of 1866, 42 U.S.C. §1981 and the Civil Rights Act of 1964, 42 U.S.C. §2000(e)5.

The case was not certified as a class action. All of the potential plaintiffs were members of the local union whose names and addresses were well known. Instead, we ruled that individual plaintiffs could be joined if they desired to be joined and after members of the union were contacted, 25 actual plaintiffs elected to join out of some 300 black union members.

During length pretrial preparation it became apparent that the claim for money damages was relegated to a claim that the black musicians who had joined as plaintiffs would have made more money than they did make if they had been engaged to play in so-called better locations, i.e., better engagements. An analysis of the union's records during discovery had revealed that the black union members were probably making more money than the

white union members. Therefore, the claim for money damages took the form that the black musicians, because of the alleged discrimination resulting from the union's refusal to extend the merger agreement, had not been able to make as much money as they should have made because they had not been employed as frequently in the better establishments of the city where wages were presumably better than they were in the more numerous bars and taverns and clubs of the city. The union classifies places of entertainment and demends more wages in places with the higher classifications.

The theory, therefore, on which the case went to trial was that the union was discriminating because it would not extend the merger agreement, that therefore, black people could not assure themselves of representation on the executive board or among the officers because they were outvoted and that therefore, no one was present at the union headquarters to represent them and that inquiries came into the union office for musicians and that work was not referred to them in the better establishments and they consequently lost money which they otherwise would have made.

With this background we proceed to examine the evidence: As already noted, prior to 1965 the respective local unions were segregated. They were both affiliated with and governed by the American Federation of Musicians AFL-CIO. Musicians from Allegheny County were eligible for membership in the locals which apparently had existed for many years. As long ago as 1935 they were in existence as separate locals and the National Union as long ago as 1954 treated them as separate unions. Local 471 collected dues from black members and Local 60 collected dues from white members. The wage scales were the same and the locals in some cases



accepted members of either race but it is fair to say that the locals remained largely segregated until the time of the merger agreement.

The local unions described, as well as the National Union, govern their members very loosely, and historically did so, because of the type of work they do. The main function of the unions was, and now is, to fix wage rates. Most musicians work at two jobs, one by day and one in the evening. The latter is a musicians's job located and obtained pretty much by chance. Orchestra leaders hire the people they want or need. Places of entertainment which require only one or a few musicians frequently hire them directly. People who need an orchestra for a wedding frequently call an orchestra leader personally, and anyone of a dozen means might lead to an engagement, including the use of so-called "booking agents." Although the plaintiffs contend that many calls for musicians come to the union office now, the unions point out that they operate no hiring hall as such and this, of course, is obvious. The unions contend that they are not instrumental in referring people for employment and, in fact, almost never receive inquiries leading to employment. On the other hand, the plaintiffs complain that such calls are received and are not referred to blacks because of the absence of black officers or executive board members.

Historically, calls for musicians infrequently came to either union office. Each union from the 1930's onward had a small social club room somewhere in the city and in connection with it, a small office. The club room was equipped with a liquor license and a minimum amount of union activity occurred, usually social in nature and mostly centered around the club room. There was not much social intercourse between the locals. The plaintiffs point this out

as evidence of past discrimination.

There was some friction between the locals in the early days when they attempted to segregate places of entertainment, i.e., when Local 60 would try to keep Local 471 members from contracting to entertain at establishments over which Local 60 claimed jurisdiction.

It is fair to say that the respective locals were largely segregated from the 1930's onward and that discrimination was practiced as we understood it.

The National and the Locals recognized this condition as illegal and I think they recognized it as wrong. They were, of course, forced to integrate and to adopt measure to put an end to the situation. The merger agreement was accordingly negotiated in 1965.

The five-year period set aside for the planned integration of the local unions was thought by the negotiators to be a sufficient period within which to mix the races, establish social intercourse, create friendships, foster interest in the union on behalf of both races, establish good will and convince all union members that they should vote for men because of their merit. This was the intent of the merger agreement and, of course, it was the intent of the law.

The separate social clubs were abolished (Local 471's club ceased to exist sometime before 1965) and there came into existence one club and one office but customs did not change very much. There was no hiring hall. Union members still got their jobs in the same ways. Relatively few calls came to the



office. Relatively few members engaged in social intercourse and relatively few members took any interest in union politics. They went about their separate ways and even though the former members of 471 were guaranteed the executive board memberships and one assistant to the President, there was no rapid change even during the first five years.

In fact it was stipulated that since the National Union instituted its policy of requiring mergers (and they were required in many cities all over the country) the number of black delegates at the American Federation of Musicians Convention has decreased.

This condition would not normally be expected, i.e., that the effort at merger and integration of the locals around the country would result in less black representation at the National Convention. It is cited by plaintiffs as evidence that the merger agreements have been useless or worse than useless. In fact, they argue that conditions for them have been much worse since the merger than before. This arguments points up an apparent inconsistency in the plaintiffs' case. While the contention is that the merger agreement made conditions much worse, it should nevertheless be re-instituted. Perhaps this is not an inconsistent position. The plaintiffs argue that there are only 300 black members of the local but around 2000 white members so it is useless to expect black members to win office in an open election. Thus re-institution of the agreement is necessary to guarantee black representation.

However, another inconsistency is apparent in the record. While arguing that a black member cannot be elected to office the plaintiffs introduced evidence that

when a black member was about to win office they asked him to ease up in his effort lest he would win and thus destroy the argument. The evidence was that the President of the Local in the 1974 election asked a prominent black union member to run for office. The candidate testified that he could have won easily but a committee of black members asked him to withdraw. Since it was too late to withdraw, he was asked to ease up and he did so. He decided after the visit that he was perhaps being used, i.e., that the union could argue when he won that the merger was working. He went along with the committee's view that if he won it would show that the merger was working and detract from the force of their argument in this litigation. He failed of election by 15 votes. Perhaps we should mention that voting is conducted by mail by sealed ballot under the direction of the American Arbitration Association.

Plaintiffs admit that the present President of the Local (Osgood), who apparently took office after the 1970 election, has been doing the best he can to integrate the membership. To do this, he has sponsored various social events in an effort to foster friendship. It is admitted that he does not discriminate.

On the other hand, plaintiffs admit a lack of interest in making the merger work. At times black members have refused to participate in elections, in effect boycotting the elections by inaction or non-attendance at meetings (p.224). They have neglected to take part in the social affairs planned by the President since the December 1970 election (p. 228). In the 1972 election there were no black candidates.

The two principal witnesses for the plaintiffs testified that they



had given up all interest in the Union before the merger agreement came into being, albeit out of a sense of frustration.

Whether there is any disparity in earnings between black and white musicians cannot be determined. Experts were employed by both sides in an effort to determine from computer printouts, based upon the National's financial records, the relative earnings of the members of the local over a period of years. The earnings records are not completely accurate because they indicate only minimum earnings. The experts could not determine whether any losses have occurred because of any action or lack of action by the unions. They believe that black musicians may be working more frequently than white musicians and perhaps making a little more money but this may be because the black members try harder or are in more demand or because they don't have as consistent daylight employment. Whether they play less frequently in the so-called better locations is again impossible to determine on the basis of the record. The experts do conclude tentatively that the earnings of black members have improved since the merger.

Our conclusion is that there has been no evidence presented to the court that the unions, either the National or the Local, are discriminating against the plaintiffs at this time. While prior to the merger agreement the locals were segregated and discrimination existed, it is conceded that since the merger and particularly since Osgood became President in 1971 he, himself, has been fair to all concerned and has been doing his best to wipe out discrimination.

The merger has not satisfied everyone. Those concerned could do no less than institute the agreement in 1966,

however, and it must be continued. We do not believe we should destroy the concept that the members can engage together in running the union. We believe the present officers are sincere. The record shows that black members can win elections and that social intercourse and friendship can develop and become commonplace. It will require effort on both sides and a combined effort has been lacking. Hopefully, this litigation has pointed up the lack of interest in this union by a great many of its members, white and black.

We conclude, however, that on this record the prayers for injunctive relief and for damages must be dismissed.

This memorandum shall be deemed to comply with Rule 52.

It is so ordered.

/s/ Barron P. McCune
BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 75-2244

---

BLACK MUSICIANS OF PITTSBURGH and GEORGE CHILDRESS, RUBYE YOUNGE, DeRUYTER KEMP, THOMAS MILLER, CHARLES AUSTIN and GEORGE SPAULDING, individually, and on behalf of all other persons similarly situated,

Appellants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor-Plaintiff

v.

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO

(D. C. Civil No. 71-1008)

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

---

Argued September 8, 1976

Before VAN DUSEN, HUNTER and WEIS,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.1/

Costs taxed against appellants.

BY THE COURT:

/s/ Francis L. Van Dusen
Circuit Judge

Attest:
/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: September 24, 1976

1/ See Black Musicians of Pittsburgh, et al., Plaintiffs, and EEOC, Intervenor-Plaintiff v. Local 60-471, American Federation of Musicians, AFL-CIO, et al., Memorandum of August 28, 1975, reproduced at Appendix G1-14, and Opinion of May 8, 1974, reproduced at Appendix D1-20 (Civil Action 71-1008, W.D. Pa).



UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2244

BLACK MUSICIANS OF PITTSBURGH and GEORGE CHILDRESS, RUBYE YOUNGE, DeRUYTER KEMP, THOMAS MILLER, CHARLES AUSTIN and GEORGE SPAULDING, individually and on behalf of all other persons similarly situated,

Appellants

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor-Plaintiff,

v.

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO

(D.C. Civil No. 71-1008)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Francis L. Van Dusen
JUDGE

Dated: October 26, 1976



## CIVIL RIGHTS ACT OF 1866

42 U.S.C. Section 1981:

### Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1988:

### Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the

trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Title VII, Civil Rights Act of 1964

Sec. 703(c); 42 U.S.C. Sec. 2000e-2(c):

Unlawful employment practices--
Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or would otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sec. 706(g): 42 U.S.C. Sec. 2000e-5(g):

(g) If the court finds that the respondent



has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-850

BLACK MUSICIANS OF PITTSBURGH, et al., individually and on behalf of all other persons similarly situated, *Petitioners*,

v.

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO, *Respondents*.

## MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HENRY KAISER
RONALD ROSENBERG
VAN ARKEL, KAISER, GRESSMAN, ROSENBERG & DRIESEN
1828 L Street, N.W.
Washington, D. C. 20036

HAROLD GONDELMAN
BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG
Frick Building, 10th Floor
Pittsburgh, Pennsylvania 15219

*Attorneys for Respondents*

*Of Counsel:*

RICHARD D. GILARDI, ESQ.
GILARDI & COOPER
606 Oliver Building
Pittsburgh, Pennsylvania 15222

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

---

No. 76-850

---

BLACK MUSICIANS OF PITTSBURGH, et al., individually and on behalf of all other persons similarly situated, *Petitioners,*

v.

LOCAL 60-471, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO and AMERICAN FEDERATION OF MUSICIANS, AFL-CIO, *Respondents.*

---

## MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

The petition urges only that the courts below erred in applying the law to the facts and raises no legal issues warranting certiorari. Petitioner misconstrues the purposes of certiorari jurisdiction in arguing that this Court should provide him yet a third review of facts that two courts have found unpersuasive.[1] Petitioners admittedly boycotted the union's elections but now insist that their lack of representation in the local's officialdom is the product of discrimination. Rejection of the extraordinary contention that a party

---

[1] Petitioners' Brief to the Court of Appeals made clear that their contentions were factual, Brief for Appellant, p. 13. Summary affirmance was particularly appropriate since Petitioners challenged factual findings.

that has refused to participate in the electoral process is entitled to such office by judicial fiat raises no substantial issue of law requiring review by this Court.

The trial court found, following years of intensive discovery and a full trial, "... that there has been no evidence presented to the court that the unions, either the National or the Local, are discriminating against the plaintiffs at this time." Opinion of District Court, 11a. In rejecting Petitioners' contentions, the trier of fact specifically found that the President of defendant Local "... has been fair to all concerned and has been doing his best to wipe out discrimination." *Ibid.* Petitioners proferred no evidence of present discrimination nor of present effects of past discrimination below and present no contention of such discrimination here. These critical factual findings by the trial court were not rebutted in the Court of Appeals or the petition for certiorari.

Petitioners had enjoyed five years of guaranteed representation voluntarily provided by the defendants. The merger took place more than eleven years ago and judicially mandated representation is clearly inappropriate so long after the merger. Indeed, the transitional protection plaintiffs obtained at the time of merger by defendants' voluntary act was far longer than that ordered by any court in any previous case and itself expired more than six years ago. Defendant International had been sued by formerly white locals who claimed that even transitional protections so limited in time violated the mandates of the Landrum-Griffin Act and other statutes. See *Local 10, AFM* v. *AFM,* 57 LRRM 2227 (N.D. Ill. 1964); *cf. Musicians Protective Union Local No. 274, AFM* v. *American Federation of Musicians,* 329 F. Supp. 1226 (E.D. Pa.



1971). Contrary to Petitioners' contentions, therefore, they had been the beneficiaries of extraordinary efforts to ease the difficulties of merger. Further extension of guaranteed representation for an indefinite period of time, as urged by Petitioners, promotes separation not integration and was properly rejected by the courts below.

Petitioners' claims that the absence of present black officers is attributable to alleged past discrimination were specifically rejected. Rather, the trial court found that Petitioners had engaged in "... boycotting the elections by inaction or non-attendance at meetings." Opinion of District Court, 10a. In addition, the District Court found that Petitioners had urged one black candidate who enjoyed wide support "... to ease up in his effort lest he would win and thus destroy (their legal) argument ..." *Ibid.* 10a.[1a] The courts below therefore properly found that Petitioners' wounds were self-inflicted and capable of healing by the simple act of running for election.[2]

Petitioners refuse to seek election but insist that this Court must mandate guaranteed offices for them for an indefinite period of time. Petitioners insist upon a judicial rather than an electoral victory. They ask this Court to order that offices be provided on the basis of color—an order compelling discrimination expressly prohibited by the statute,[3] one that would be

---

[1a] Petitioners acknowledge that they had successfully pressured other blacks to boycott the local's elections. Pet. p. 7.

[2] The District Court found that "... the record shows that black members can win election ... (,)" 12 a, but had not by reason of the boycotting and refusals to participate.

[3] 42 U.S.C. § 2000e-2(j), *cf. Chance* v. *Board of Examiners,* — F.2d —, 11 FEP Cases 1451 (2d Cir. 1976).

totally unprecedented [4] and would require this Court to ignore its own admonition that questions of remedy rest in the sound discretion of the district courts. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 770, 779 (1976).

## CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

HENRY KAISER
RONALD ROSENBERG
VAN ARKEL, KAISER, GRESSMAN,
ROSENBERG & DRIESEN
1828 L Street, N.W.
Washington, D. C. 20036

HAROLD GONDELMAN
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG
Frick Building, 10th Floor
Pittsburgh, Pennsylvania 15219

*Attorneys for Respondents*

*Of Counsel:*

RICHARD D. GILARDI, ESQ.
GILARDI & COOPER
606 Oliver Building
Pittsburgh, Pennsylvania 15222

January 16, 1977

---

[4] The cases Petitioners cite as permitting a judicial order of guaranteed representation are totally inapposite. Petition, p. 9. No court has ordered guaranteed representation where the original merger was voluntary as it was here; nor has any court ordered guaranteed representation for more than two years following a court imposed merger. Petitioners enjoyed five years of guaranteed representation by Respondents' voluntary act and their demand for judicially mandated offices without elections for an indefinite period of time seeks relief never granted before.